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December 15, 2006

Via Hand Delivery and First Class Mail

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, D.C. 20005

Re: Comments on Economic Impact of Proposed Class II Classification Standards (71 Fed. Reg. 30,238 (May 25, 2006)), Proposed Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)), and Proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)); Comments on Proposed Alternative.

Dear Chairman Hogen:

Enclosed please find the comments of Rocket Gaming Systems, a commercial enterprise of the Miami Tribe of Oklahoma Business Development Authority ("MBDA"), on the National Indian Gaming Commission's ("NIGC") economic impact analysis of its proposed Class II classification standards, prepared by Dr. Alan Meister and entitled, "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," as well as the report prepared by bmmtestlabs "Comparison Analysis of Various Class II Configuration Options." MBDA also offers several additional comments on the NIGC's other pending proposals – the proposed Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)), proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)), and recently proposed alternative Class II classification regulations – as well as suggestions on the overall process.

Dr. Meister's study demonstrates that promulgation of the Classification Standards alone would cost Indian country over \$1.483 billion in annual revenue. While that figure alone should give the NIGC pause, it does not reflect the true cost of the NIGC's combined proposals. Dr. Meister's study does not include the costs associated with the facsimile definition, which as we discussed in our previous comments could outlaw the use of all electronic aids to Class II gaming, and result in losses of over \$2.5 billion. Nor does the study include the cost of the proposed technical standards, which if promulgated in their current format would themselves impose costs of between \$1 and \$2 billion in retrofit and replacement costs.

While we submit the following comments on the economic impact of the NIGC's currently proposed regulations for the record, we note that we are extremely encouraged by the progress made in recent days by the joint Tribal/Manufacturer task force on the NIGC's proposed technical standards. Beginning last week in Washington D.C. at the meeting of the Classification Advisory Committee and continuing this week in a three day meeting in Las Vegas, the jointly assembled tribal and manufacturers' representatives have made considerable

progress on proposing suggested revisions to the NIGC's proposed technical standards so that they more accurately focus on the Class II gaming system as a whole. As we have already stated over the course of our meetings to NIGC representatives attending as observers, it appears that the proposed technical standards were adapted from Class III jurisdictions across the globe, and therefore improperly focus on a Class III box rather than a Class II gaming system. We believe that given a sufficient amount of time, our efforts will be successful in assisting the NIGC create a workable technical standard that helps draw a bright line between Class II electronic gaming systems and Class III machine boxes while protecting the integrity of the Class II industry, the security of tribal gaming operations and tribal assets.

We have made every good faith effort to make as much progress as we can, and hope to be able to provide the NIGC with a first cut of our proposal in the very near future. We are encouraged by the fact that the NIGC has extended the comment period on the proposed technical standards to January 31, 2007 which should allow us sufficient time to complete our work. We believe that if a properly drafted technical standard can be developed, the remainder of the NIGC's current Class II proposals will become unnecessary. As detailed below for the record, the NIGC's current Class II proposals would be so costly as to be practically unworkable.

1. Dr. Meister's Report demonstrates that the NIGC's proposed rules would have a devastating and unprecedented economic impact on Indian country.

The Economic Impact Analysis prepared by Dr. Alan Meister, Ph.D., "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations," demonstrates that the NIGC's proposed Classification Regulations would result in annual losses of \$1.483 billion in revenue across Indian Country. Such staggering losses, even over a single year, would devastate many tribal economies.

The potentially devastating economic impact of the NIGC's current proposal is starkly illustrated by the findings in Dr. Meister's report. His report confirms that:

1. The proposal would cost tribes \$1.483 billion in lost revenues per year across Indian country.
2. The proposal would result in Class II systems that are slower, more cumbersome to play, less diverse, and less appealing to patrons and which generate less revenue.
3. No past or current Class II device would qualify as Class II under the proposed regulations.
4. Tribes may have to shut down their facilities; and it is likely that some smaller Indian gaming facilities would have to shut down.

Even as the Meister Report confirms the spectacular impact the proposed regulations would have on tribes throughout Indian country, it is fundamentally conservative,¹ and does not fully capture the cost of the NIGC proposals. As detailed below, it suffers from conservative assumptions that do not accurately reflect the impact these regulations would have on tribal economies. Accordingly, we respectfully request that it be revised along the following lines to more accurately capture the full cost of the proposed rules.

1. The Meister Report improperly downplays the impact of the regulations by focusing on Scenario 2, which excludes 75 percent (or over 40,000) of all Class II games by excluding states like Oklahoma where tribes have a "viable alternative" to Class II gaming. This assumption ignores the reality that many of our client tribes in Oklahoma supplement their Class III operations with Class II. The proposed Class II regulations would reduce Class II revenues regardless of whether there is a compact or not.

Class II is important not only as a supplement to Class III gaming, but also as a negotiating tool for Class III compacting. The proposed regulations would negatively impact both, regardless of whether there is a viable alternative, and the Report should be revised to reflect this.

3. The Meister Report is incorrectly based on the assumption that the proposed regulations would result in the creation and implementation of a MegaMania-type system across Indian country. The Report's calculation of lost revenues is based on the difference between revenue generated by current Class II systems and the Mega-Mania system. This assumption fails to recognize that the proposed regulations are impossible to meet and call for the creation of a game that is not economically viable.

If there are no games built to meet the new standards, there will be no Class II games for tribes to operate and the entire Class II industry could collapse. If that were to occur, lost revenues would be much higher than \$1.483 billion. By Dr. Meister's estimation, "if lost revenue is significant enough to force a gaming facility to shut down, then lost gaming revenue would equal current gaming revenue of that facility. For this reason, estimated lost gaming revenue is likely to be conservative." If the entire Class II industry were to collapse, lost revenues to tribes would be well over \$2.5 billion by Dr. Meister's own calculation.

4. Dr. Meister's Report recognizes that many facilities may have to endure temporary closure when changing over to compliant games. The study fails to account for the costs associated with temporary closures. The Report's calculation of lost revenues do not account for the full cost of the proposed regulations in the first few years of implementation where – assuming again for arguments' sake that the standards could ever be met – tribes are forced to close up shop to await certification and switch out games. During these periods, tribes would not lose 57 percent of their income, they would lose 100 percent of their income. As a result, even if

¹ As Dr. Meister's report notes, "...estimated lost gaming revenue is likely to be conservative" because it fails to account for the fact that many facilities might have to shut down altogether.

the standards could be met, tribes would face the potential of a full \$2.5 billion in lost revenue in the first year alone.

5. The NIGC has improperly attempted to influence the results of the Meister Report by excluding an undefined class of Class II devices in Scenario 3 that it believes – without explanation – do not qualify as Class II. This Scenario is inconsistent with the IGRA, the NIGC's current regulations, and case law and should not be relied upon by the NIGC.

6. While the Meister Report properly accounts for lost non-gaming revenues that would result from the rules, it does not account for lost non-Indian revenues that would result. Many tribal Class II casino operations have become important economic engines for the local economy. If the regulations were promulgated as proposed, they would not only destroy the tribal gaming industry, but also result in the loss of thousands of jobs for non-Indian employees, as well as many businesses whose economies are dependent upon tribal Class II gaming. The Report does not quantify these costs, and should be revised to do so.

7. The Meister Report fails to estimate a number of other likely costs that would have to be borne by tribes as a result of the proposed regulations. While the Report recognizes that tribes would have to bear increased capital costs associated with switching out new Class II systems, regulation, training, revenue sharing and financing, it does not quantify these costs, which could themselves be prohibitive. By our calculations, the capital cost of replacing and/or switching out all current Class II systems with new Class II systems (which is what the proposal would require) would be well over \$1 billion alone. If necessary, we can provide a breakdown of those costs. The Meister Report should be revised to fully capture all of these costs as well.

8. The Meister Report only focuses on lost tribal member casino jobs. This fails to recognize that the proposed regulations would result in the loss of a number of tribal government jobs that are dependent on Class II gaming revenue, as well as the loss of a number of non-Indian casino and casino-related jobs. The Report should be revised to properly account for these additional jobs losses as well.

2. The Meister Report Confirms that the NIGC Must Conduct Additional Economic Impact Analyses Before Promulgating its Proposed Rules

The economic impact analysis prepared by Dr. Meister confirms that the NIGC's proposed regulations do not – as suggested in the preamble to the proposals – meet the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 801 et seq., or the Unfunded Mandates Reform Act, 2. U.S.C. § 1501 et seq. Nor do the proposed rules meet the requirements of Executive Order 12866, Executive Order 12988, and Executive Order 13175. Taken together, these statutes and executive orders are designed to ensure that regulatory proposals of the sheer economic magnitude currently contemplated do not improperly impact small governments like tribes, regulated entities or the U.S. economy. The NIGC should reconsider its proposal in light of these requirements.

3. The BMM Study Fails to Account for its Methodology and is Limited in Scope

The study conducted by bmmtestlabs is vague in its methodology and does not accurately reflect the true loss of revenue that would result from these games. First, the report does not explain the model used, and it is uncertain whether BMM used a mathematical model, and actual Class II system or some type of simulator. Accordingly, its results are unverifiable. Second, the results only list differences in revenue based on speed of play, and fail to reflect the effect of playability on revenue. In addition to increasing time of play, the proposed regulations require new design criteria like multiple touches and ball releases that will significantly hinder play and make the game much less attractive to patrons. The BMM study fails to recognize the adverse effect on playability caused by the new standards, and instead relies on the incorrect assumption that there is a direct correlation in revenue between current games and the proposed games based solely on time of play. The study should be revised to explicitly note this limitation, and relied upon only in light of this limitation.

4. The NIGC Needs to Accurately Assess the Cost of the Proposed Facsimile Definition, the Proposed Technical Standards and the Recently Released Alternative Classification Standards Before Moving Forward.

Neither the Meister Report nor the BMM study account for the cost of the proposed facsimile definition, the proposed technical standards or the recently proposed alternative to the classification standards. Both reports are focused solely on the proposed Classification standards. As a result, the NIGC's economic impact analysis of the proposal is incomplete. As we discussed in our prior comments, the facsimile definition could have the same effect as the Classification standards and result in banning all economically viable forms of Class II gaming. If that were the case, it would result in losses of \$2.6 billion in lost revenue alone. Similarly, no game in existence currently meets the requirements of the proposed Technical standards, which we estimate would alone cost tribes and manufacturers an additional \$1 - \$2 billion to implement in their current, improperly Class III focused iteration. If the NIGC decides to move forward with this combination of regulatory proposals despite their overwhelming cost, the NIGC should complete an economic analysis of the combined effect of its proposal by assessing the impact of these rules.

As discussed above, however, we are diligently working with other manufacturers and tribes to propose a workable alternative to the NIGC which we believe would accomplish the overarching goals of the NIGC in this combined regulatory proposal while providing a workable technical standard for industry and tribes. We believe that if properly implemented with appropriate grandfathering clauses, such a proposal would cost a fraction of the NIGC's combined proposals while providing all of its intended benefits. An important part of that process, of course, is to document an estimation of the costs and benefits of the technical standards once they have been revised. While it is premature to do so before they have been revised, we believe it will be imperative to do so once work has been complete.

5. The NIGC's Proposed Alternative Classification Standards Still Do Not Result in an Economically Viable Game, and are Unrelated to the Statute

The NIGC's alternative proposal for classification standards, like the earlier version, result in an economically unviable game and impermissibly limits the use of electronic aids to the game of bingo. In addition, it would improperly and illegally grant States the unprecedented authority to take part in Class II gaming. Rather than continue work on this conceptual alternative proposal, we believe that the NIGC's focus should be on creating a workable alternative to the technical standards which if properly revised and implemented could achieve all of the NIGC's goals at a fraction of the cost to manufacturers like MBDA and tribes across the country. That said, we offer the following comments on the proposed alternative classification regulations.

The alternative proposal is as arbitrary as the original, neither of which is based on the game of bingo. Rather than interpret the IGRA's statutory requirements for the game of bingo, the alternative proposal seeks to force a game design that does not exist, nor has ever existed.

Many of the objections we raised in our previous comments apply to the new proposal, and we do not repeat them here in their entirety. To summarize, however, the proposal still requires multiple ball releases, when there is no legal basis for doing so. Nor is there any legal basis for the prohibition of auto-daub, for the prohibition of pre-drawn balls, to restrict games similar to bingo to an arbitrary ball draw range and 5 by 5 card, to limit bingo to a 75 ball draw and 5 by 5 card, to label a game "bingo," even if the two-inch letter size is abandoned and replaced with vague standard, or to require common patterns or probabilities.

The new proposal would also illegally allow states a role in influencing Class II gaming. For the first time, the proposal would allow states to be notified of an object to Class II game certification. This grant of unprecedented authority to the States is contrary to the IGRA, which expressly granted States authority only over Class III gaming, reserving Class II for the tribes with oversight by the NIGC. It is also fundamentally at odds with tribal sovereignty.

Any alternative such as this one which makes such material changes to the proposed rule must be published as a new proposed rule with full opportunity for comment by the affected community.

Sincerely,

Hobbs, Straus, Dean & Walker

HOBBS, STRAUS, DEAN & WALKER LLP

Cc: Ron Harris, CEO Rocket Gaming Systems

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